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No. 96-1948

IN THE

Supreme Court Of The United States

October Term, 1996

STUDENT LOAN MARKETING ASSOCIATION,
Petitioner,

vs.

RICHARD W. RILEY,
Secretary of the United States
Department of Education,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The statutory provision that is the subject of this Petition is unique: it singles out a privately-owned, publicly-traded corporation by name, and imposes upon it alone a fee that has already cost over one hundred million dollars. In arguing that the fee provision is constitutional, Respondent ignores this extraordinary characteristic. Yet at the same time, Respondent argues that because the fee is singular in nature, the issues raised in the Petition are not worthy of the Court's review. This matter is deserving of consideration by the Court, however, because the fee, precisely in its uniqueness, is fundamentally at odds with the Court's takings jurisprudence; and because the rationale employed by the court of appeals in upholding the fee has grave implications for other privately-owned, government-chartered enterprises, and for other corporations providing services in connection with government programs.

Respondent, moreover, attempts to create the misimpression that the courts below conducted a factual inquiry to balance the burdens imposed by the fee against benefits purportedly conferred by the Higher Education Act ("HEA") on Petitioner, and that this Court therefore should not and need not review the balance the lower courts struck. But there was no fact-finding below. Instead, the court of appeals held the fee to be constitutional on its face as a matter of law. We respectfully submit that in so doing, the court of appeals applied the law incorrectly, based upon irrational and improper considerations. Given the ramifications of the appeals court's flawed reasoning, review by this Court is appropriate and desirable.[1]

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[1] If, as Respondent suggests, certiorari should be denied in takings cases that "turn[ ] on the circumstances of a particular program," (Br. in Opp'n 7), no takings claim would ever have been subject to Supreme Court review, inasmuch as all such claims involve "ad hoc, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986).

1. The Imposition Of A Fee Upon A Single, Privately-Owned Corporation Conflicts With The Takings Jurisprudence Of This Court.

The provision at issue imposes a fee on a class of one -- the Student Loan Marketing Association ("Sallie Mae") -- in contravention of the fundamental premise that governmental burdens must be imposed equally on all similarly situated property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1023 (1992)(quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 n.30 (1978). This striking feature distinguishes the present case from all takings cases cited by Respondent. The users' fee at issue in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), for example, was applicable to all parties who recovered assets through the Iran-United States Claims Tribunal, not just to Sperry. Similarly, the provision at issue in *Leonard v. Earle*, 279 U.S. 392, 396 (1929), requiring oyster packers to contribute a percentage of their shells or to pay a tax, was applicable to all oyster packers, not just one.

Respondent also cites two cases upholding a statute authorizing the federal government to recover excess reserve funds from state agencies that administer an aspect of the student loan program, *Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894 (6th Cir. 1990) and *Colorado v. Cavazos*, 962 F.2d 968 (10th Cir. 1992). The provision at issue in those cases affected equally all such agencies, not simply the agency that at the time of enactment happened to be the single largest holder of excess reserves. The courts in the *Cavazos* cases further determined that the excess reserves did not constitute "private property" for purposes of a takings claim, and that the state agencies involved were federal agents that essentially were custodians of the funds at issue. *Ohio Student Loan Comm'n*, 900 F.2d at 898-99; *Colorado*, 962 F.2d at 971. Here, there can be no question that Petitioner, although created by act of Congress, is a privately-capitalized, privately-owned corporation, and that the assets subject to the fee are private property. These cases therefore are inapposite.

Respondent does not dispute that Sallie Mae holds only approximately one-third of federally guaranteed loans. Yet Respondent does not offer any meaningful distinction between Petitioner and other holders of loans subject to the federal loan guarantee regime of the Federal Family Education Loan Program ("FFELP"), such that would warrant singling out the assets of Petitioner for a forced contribution to support the guarantee. Respondent does not and cannot assert that as compared to all other holders of FFELP loans, Sallie Mae benefits uniquely from the existence of the guarantee program, which Sallie Mae alone is compelled financially to support.

Nor is there any basis, in fact or in the record, for Respondent's suggestion that Petitioner is uniquely responsible for the rate of default on student loans (Br. in Opp'n 10 n.7), or that Congress was motivated by the default rate to enact the fee against Sallie Mae. Br. in Opp'n 3-4. Sallie Mae does not originate loans; it acquires them in the secondary market. 20 U.S.C. § 1087-2. Therefore, any credit risks associated with loans held by Sallie Mae pre-exist Sallie Mae's ownership. And there simply is no evidence in the record or anywhere that loans held by Sallie Mae experience a higher default rate than those held by any other holder of FFELP loans. *See* Pet. 11-12.

Respondent asserts that the fee is appropriate because it was passed contemporaneously with a number of amendments to the HEA which, it is contended, mete out to a variety of participants in the FFELP the costs of "increas[ing] the financial soundness" of the program. Br. in Opp'n 12. In stark contradistinction to the offset fee, however, the provisions cited by the Respondent (*id.* at 11) apply with equal force to an entire class of participants in the relevant program, not just to one. For example, the provisions charging a fee to holders of consolidated loans and reducing the federal government's guarantee obligations apply to all holders of FFELP loans, not only Sallie Mae. Similarly, the provision imposing a user fee on lenders pertains to all

program lenders, not just to whichever entity is the single largest lender in the program.[2]

Moreover, to the extent Respondent seeks to imply that the offset fee was enacted because of congressional concern with the "financial soundness" of the student loan program, there is no support for that proposition in the provision's legislative history. The only reason affirmatively stated by Congress for enacting the offset fee was to meet overall Department of Education budget deficit targets. *See* H.R. REP. No. 103-111 at 105 (1993); *see also* H.R. Con. Res. 64, 103d Cong. § 12(a) (1993); 139 CONG. REC. H1747, H1753 (daily ed. Mar. 31, 1993). The "financial soundness" of the FFELP program was not threatened in any way at the time the fee was enacted.

The only quality unique to Sallie Mae which was relied upon by the court of appeals to justify singling out Sallie Mae for an enormous financial burden is its status as the single largest service provider under the FFELP program. Pet. App. 7-9. As discussed at length in the Petition, this rationale has significant constitutional ramifications for all service providers participating in government programs, and is deserving of this Court's review. Pet. 9-13.

2. Immunity From State And Local Taxes Under The Supremacy Clause, And Other Attributes Of GSE Status, Do Not Justify Imposition Of The Fee.

The other factor on which the court of appeals primarily relied was Petitioner's immunity from certain state and local taxes. Respondent asserts this *post hoc* rationale justifies the fee notwithstanding that the benefits to Sallie Mae of such tax immunity do not begin to approximate the burdens imposed by the offset fee, and notwithstanding that

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[2] As noted above, Petitioner is a purchaser of loans, not a lender. In limited circumstances, however, Petitioner is authorized to act as a "lender of last resort" to students who cannot obtain financing elsewhere. 20 U.S.C. § 1087-2(q).

there is absolutely no suggestion in the legislative history of any relationship between the fee and the constitutional immunity Petitioner shares with other GSEs from such taxes.

We respectfully submit that the Court should review whether such tax immunity appropriately is treated as a benefit conferred on GSEs such as Petitioner so as to warrant an invasion of their assets by Congress. This immunity, which flows from the Supremacy Clause and exists to further the federal government's purposes, costs the federal government nothing. Indeed, the tax immunity actually results in an increase of Petitioner's tax obligations to the federal government. Accordingly, any benefits emanating from such immunity flow substantially to the federal government, which is permitted thereby to effectuate the goals of a federal program, as well as to collect additional taxes from Petitioner. State and local governments are disadvantaged by the existence of this immunity, not the federal government. The lower court's reliance on constitutionally-conferred tax immunity as a justification for seizing a privately-held corporation's assets thus has significant ramifications for other shareholder-owned GSEs, and, under principles of federalism, for states and localities as well. *See* Pet. 13-17. Accordingly, we respectfully submit that it is also an issue which this Court should review.[3]

Even if the court of appeals appropriately considered the tax immunity to be a benefit "conferred" on Petitioner, the question remains whether the enormous financial burdens imposed by the offset fee "fair[ly]

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[3] The Secretary incorrectly asserts that the federalism issues raised by the court of appeals' reliance on Petitioner's tax immunity are not properly before the Court because they were not raised below. Br. in Opp'n 13 n.9. Sallie Mae, however, raised this issue in the court of appeals, and in particular, asserted that adoption of Respondent's de facto waiver theory would result in an impermissible taking of states' assets. *See* Brief for the Appellant Student Loan Marketing Association (July 5, 1996) at 45-48 & n.22.

approximat[e] . . . the cost of benefits supplied" by Sallie Mae's immunity from state and local taxes. *Sperry*, 493 U.S. at 60 (quoting *Massachusetts v. United States*, 435 U.S. 444, 463 n.19 (1978)). Any tax savings to Petitioner are significantly lower than the costs imposed by the offset fee. Yet the court of appeals assumed, incorrectly, that they were roughly equivalent. Moreover, the lower courts did not, as Respondent suggests, strike a debatable balance between benefits and burdens, but simply assumed the constitutionality of the statute, in denigration of the standards laid down by this Court.

In an effort to dissuade this Court from granting the Petition, Respondent also inflates the significance of two other purported "benefits" of GSE status attributed to Petitioner, which the court of appeals appropriately discounted. These are Petitioner's access to Treasury borrowing, unused for over a decade, and Petitioner's exemption from registration requirements of the Securities and Exchange Commission ("SEC"). Br. in Opp'n 9. The appeals court correctly recognized the questionable value of these attributes. *See* Pet. App. 10. At best, the lower court's statements that these factors "appear" material and are "ill-defined," and that "Sallie Mae's various advantages are hard to quantify," (Pet. App. 10), only further underscore that these factors are too impalpable to weigh in the takings balance.[4]

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[4] Additionally, as to the exemption from SEC registration, Respondent incorrectly states that the registration fee of 0.03% equates to ten percent of the offset fee. *See* Br. in Opp'n 9 n.6. Respondent did not consider that the SEC registration fee, 15 U.S.C. § 77f(b), is a one-time fee paid at the time a registration statement is filed. The registration fee therefore must be applied over the length of the associated securities, and Sallie Mae's debt securities typically have an average duration of three years. In contrast, the 30-point basis fee is incurred *monthly* on every loan acquired by Sallie Mae after the effective date of the Act. Accordingly, the registration fee is an insignificant fraction of the offset fee.

3. Privatization Does Not Diminish The Significance Of The Constitutional Issues Raised In This Petition.

Respondent argues that this Court should not exercise its certiorari jurisdiction because Sallie Mae's privatization defuses the importance of the issues in this case. Br. in Opp'n 12-13. This assertion is in error on several grounds.

First, although the reorganization of Sallie Mae became effective August 7, 1997, the legislation authorized a lengthy transition. Indeed, under the Reorganization Act, Sallie Mae is authorized to continue student loan purchases through September 7, 2007. 20 U.S.C.A. § 1087-3(c)(6)(A)(i)(1997). Any loans held by Sallie Mae during that period will be subject to the fee.[5] Additionally, there remains at issue the tens of millions of dollars in fees that Petitioner has paid to date. Finally, Sallie Mae's reorganization in no way diminishes the enduring significance of the court of appeals' holding for other GSEs and large service providers in government programs. Accordingly, there is still a very live case or controversy here, and one of abiding vitality to Petitioner and many others.

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[5] Pursuant to the Reorganization Act, Sallie Mae has become a wholly-owned subsidiary of a publicly traded holding company, SLM Holding Corporation. *See* 20 U.S.C.A. § 1087-3(a).

For these reasons and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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